91-2050

No.

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C.,
Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.;
M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS;
LYNCH, CHAPPEL, ALLDAY AND ALSUP;
AND SMALL, CRAIG & WERKENTHIN
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMIE WALL
Texas State Bar Card 20756700
12222 Merit Drive, Suite 955
Dallas, Texas 75251
(214) 991-0991
(214) 991-0993 fax

Counsel for Petitioners
Ray G. Besing and
Ray G. Besing & Associates, P.C.

June 22, 1992

QUESTIONS PRESENTED

(1) Whether a prior state court judgment collaterally estopped Petitioners from litigating their standing to invoke 11 U.S.C. § 108(a) to extend the period of limitations governing Petitioners' legal malpractice claims against Respondents.

(2) Whether 11 U.S.C. § 108(a) applied as a matter of law to extend the period of limitations governing Petitioners' legal malpractice claims even though Plaintiffs filed suit on September 19, 1989, after their bankruptcy plan of reorganization was confirmed on June 28, 1989.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Ray G. Besing, a Dallas lawyer; Ray G. Besing & Associates, P.C., a professional corporation, in Dallas; the law firm of Lynch, Chappel, Allday & Alsup (now Lynch, Chappel & Alsup, a professional corporation) based in Midland, Texas and having an office in Austin, Texas; The Austin, Texas law firm of Small, Craig & Werkenthin, (now Small, Craig & Werkenthin, a professional corporation); Thomas T. Rogers, an Austin lawyer, formerly with the firm of Lynch, Chappel, Allday & Alsup and later with the firm of Small, Craig & Werkenthin; the Dallas law firm of Seeligson, Douglass, Falconer & Vanden Eykel, a professional corporation (now Seeligson & Steinberg, P.C.); M. J. "Ike" Vanden Eykel, a Dallas lawyer with Koons, Fuller, McCurley & Vanden Eykel and formerly with Seeligson, Douglass, Falconer & Vanden Eykel.

None of the above mentioned corporations have parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES CITED v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW AND GROUNDS OF JURISDICTION . . 1

STATUTORY AND RULE PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

1. The Fifth Circuit and the U.S. District Court erred in affirming the Bankruptcy Court's Summary Judgment that a prior state court judgment collaterally estopped Petitioners from litigating the applicability of 11 U.S.C. § 108(a) to extend the period of limitations governing Petitioners' legal malpractice claims against Respondents 6

2. Plaintiffs filed suit within the two-year period under 11 U.S.C. § 108(a). Confirmation of the reorganization plan did not affect Petitioners' standing under that statute, and, therefore, Petitioners' were entitled to summary judgment that they had standing to invoke the limitations tolling provisions of 108(a) 9

CONCLUSION 21

TABLE OF CONTENTS (Continued)

APPENDIX (Separate Volume)

A. Opinion and Judgment of the Fifth Circuit Court of Appeals (February 21, 1992)

B. The Court of Appeals' Order Denying Petition for Rehearing (March 24, 1992)

C. U. S. District Court's Order and Judgment (June 27, 1991)

D. U. S. Bankruptcy Court's Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment (October 2, 1990)

E. 11 U.S.C. § 101(12), 108(a), 301, 349, 350, 546(a), 547(b), 548(a), 549, 1101(1), 1107(a), 1112, 1121, 1141(b); 28 USC § 151, 152(a), 1254(1); Bankruptcy Rules 3020(d) and 3022

TABLE OF AUTHORITIES CITED

Cases	Page
Citibank N.A. v. Graphic Scanning Corporation, 618 F.2d 222 (2nd Cir. 1980)	7
In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986)	12
In re Chernicky Coal Co., Inc., 67 B.R. 828 (Bankr. W.D. Pa. 1986)	14, 17
Cunningham v. Healthco, Inc., 824 F.2d 1448 (5th Cir. 1987)	10, 12, 15
In re Flying S Land & Cattle Co., 71 B.R. 183 (D. Nevada 1987)	9
In re Fortner Oilfield Services, Inc., 49 B.R. 9, 10 (Bankr. N.D. Tex. 1984)	14
In re Hargis, 73 B.R. 622, 625 (Bankr. N.D.Tex. 1987)	12
In re J. E. Jennings, Inc., 46 B.R. 167 (Bankr. E.D. Pa. 1985)	17,21
In re Korvettes, Inc., 42 B.R. 217 (Bankr. S.D.N.Y. 1984)	16
In re Lombard-Wall, Inc., 44 B.R. 928 (S.D.N.Y. 1984)	13
Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986)	6-7
Seawinds, Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 187 (N.D. Cal. 1987)	10, 15
In re Tennessee Wheel & Rubber Co., 64 B.R. 721, 727 (M.D. Tenn. 1986)	10, 14, 17, 18, 20, 21
In re Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir., 1983)	12
In re Weatherfield Farms, Inc., 34 B.R. 435, 438 (Bankr. D. Vt. 1983)	14

TABLE OF AUTHORITIES CITED (Continued)

Statutes	Page
11 U.S.C. § 101(12)	11
11 U.S.C. § 108(a)	1-22
11 U.S.C. § 301	11
11 U.S.C. § 349	11
11 U.S.C. § 350	11, 14
11 U.S.C. § 546(a)	16
11 U.S.C. § 547(b)	10, 15, 17, 18
11 U.S.C. § 548(a)	10, 15, 17, 18
11 U.S.C. § 549(a)	17
11 U.S.C. § 1101(1)	11
11 U.S.C. § 1107(a)	9
11 U.S.C. § 1112	11
11 U.S.C. § 1121	15
11 U.S.C. § 1141(b)	13, 18, 20
28 U.S.C. § 151	8
28 U.S.C. § 152(a)(1)	8
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1334(a) & (b)	8
Bankruptcy Rules	
Bankruptcy Rule 3020(d)	14
Bankruptcy Rule 3022	16
Other	
Bankruptcy Service, Lawyers' Edition, Ch. 6-10C, § 66	14
Bankruptcy Service, Lawyers' Edition, Ch. 6-10C, § 7B:66	14
Restatement (Second) of Judgments § 28	7, 8

PETITION FOR WRIT OF CERTIORARI

Ray G. Besing and Ray G. Besing & Associates, P.C. respectfully petition that a Writ of Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, entered February 21, 1992, is reprinted as Section A of the separate Appendix. The order of the United States Court of Appeals denying Petitioner's Petition for Rehearing was entered on March 24, 1992 and is reprinted as Section B of the separate Appendix. The Order and Judgment of the United States District Court for the Northern District of Texas, Dallas Division, was entered on June 27, 1991, and is reprinted as Section C of the separate Appendix. The Order of the Bankruptcy Court granting the Defendants' (Respondents') Motion for Summary Judgment, entered on October 2, 1990, is reprinted as Section D of the separate Appendix.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

The relevant sections of Title 11 USC and Title 28 USC and the Rules of Bankruptcy Procedure are listed in the Table of Authorities.

STATEMENT OF THE CASE

This appeal involves: (a) the correct construction of § 108(a) of the Bankruptcy Code, a limitations tolling statute; (b) the Bankruptcy Court's error in relying upon the doctrine of collateral estoppel and refusing to construe that statute; and (c) the District Court's and Circuit Court's affirmance of the Bankruptcy Court.

The Petitioners filed Chapter 11 Bankruptcy on March 25, 1988. The Bankruptcy Court entered its order confirming the plan on June 28, 1989. On September 19, 1989, Petitioners sued the Respondent lawyers for legal malpractice in state court. The state court granted the Respondent lawyers' Motions for Summary Judgment on the sole ground of limitations, holding that Petitioners had no standing to invoke the tolling provisions of Bankruptcy Code § 108(a), and the state's two-year statute of limitations had expired. Petitioners then filed an adversary proceeding in Bankruptcy Court seeking a declaratory judgment that they did have standing to invoke § 108(a). The Bankruptcy Court declined to hear the case but, instead, granted Respondents' Motion for Summary Judgment and denied Petitioners' Motion for Summary Judgment on the ground of collateral estoppel, holding that the state court judgment barred the Petitioners from obtaining a declaratory judgment on their standing under 11 U.S.C. § 108(a).

The United States District Court and the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court, and the Petitioners filed this Petition.

Ray G. Besing is a Dallas attorney and the sole shareholder of Ray G. Besing & Associates, P.C. The Respondent lawyers at different times, represented the Petitioners, as Plaintiffs in a suit at various times of litigation against Lyn Noble (now Lyn Noble Hawthorne) and Noble Toyota, Inc. ("Noble") for breach of

contract and damages. Petitioners' malpractice claims against the Respondents arose out of Respondents' acts of negligence during their representation of Petitioners in the underlying "Noble litigation." The relevant chronology is as follows:

In the Spring of 1984, Besing and Noble entered into an agreement to resolve and adjust their respective property rights and joint investments.

In August 1984, Besing filed suit against Noble in the Dallas State Court for breach of the agreement, damage claims and other relief. Subsequently, the case was transferred to the Austin state court, thus involving Dallas and Austin lawyers to represent Besing.

During the course of the Noble litigation (August, 1984 through January, 1984), the Respondents here: (a) did not prepare or file answers for Besing to Noble's requests for admissions and interrogatories; (b) subsequently filed evasive and non-responsive answers to interrogatories and requests for admissions; (c) did not amend defective discovery responses; (d) subsequently agreed to an onerous judgment without authority; and (e) did not obtain a transcribed record of criteria hearings in the trial court. As a result of Respondents' negligence, the trial court in the Noble litigation entirely struck Plaintiff Besing's pleadings and granted a default judgment and summary judgment on Noble's counter-claims, ultimately leading to a judgment on January 25, 1988, for Noble against Besing.

On March 25, 1988, Petitioners filed petitions under Chapter 11 seeking protection from Noble's post-judgment discovery and collection activities. Petitioners' claims against Noble and malpractice claims against the Respondent lawyers were listed as assets in the Bankruptcy schedules. The cases have not been closed. No trustee has ever been appointed.

On June 28, 1989, the Bankruptcy Court confirmed Plaintiffs' Amended Joint Plan of Reorganization. The Plan required Petitioners to pay their unsecured creditors, classes 6 and 6(a), $20,000.00 on the 60th day after confirmation, and periodic $20,000.00 payments thereafter until all the unsecured creditors

are paid in full. After confirmation, Plaintiffs continued their efforts to collect unpaid fees in order to pay their creditors.

On September 19, 1989, the Petitioners filed suit against the Respondents in the state district court in Dallas, seeking damages caused by Respondents' legal malpractice. At that time, Petitioners had barely begun executing the bankruptcy reorganization plan; the bankruptcy cases were not closed (and now are not closed) as provided in § 350 of the Bankruptcy Code; adversary proceedings concerning disputed claims were (and are still) pending; and, the Petitioners were depending on the recovery from this malpractice suit to help pay the creditors under the pay-out terms of the Reorganization Plan. Respondents only pleaded limitations as a defense. The Petitioners relied on § 108(a) of the Bankruptcy Code to extend the state period of limitations for two years after the date of filing bankruptcy, *i.e.*, two years after March 25, 1988. The September, 1989 malpractice suit was filed well within that period.

On May 31, 1990, the state trial court granted Respondents' Motions for Summary Judgment on limitations and dismissed Petitioners' suit with prejudice. The state court accepted Respondents' argument that confirmation of the Petitioners' Plan of Reorganization terminated their status as debtors in possession and, thus, their "trustee" status, so that Petitioners lacked standing to invoke § 108(a). Petitioners perfected an appeal from the state court to the Dallas Court of Appeals. The Dallas Court of Appeals affirmed the state court judgment. Subsequently, Petitioners perfected an appeal to the Texas Supreme Court, which is still pending.

Because of the U.S. Bankruptcy Court's special expertise in applying the Bankruptcy Code, on June 14, 1990, the Petitioners filed their adversary complaint for declaratory judgment in Bankruptcy Court, seeking a determination that Petitioners did have standing to rely on 11 U.S.C. § 108(a) on September 19, 1989, when they filed the state court malpractice action.

However, on October 2, 1990, the Bankruptcy Court denied Petitioners' Motion for Summary Judgment and granted

Respondents' Motion for Summary Judgment holding that, under the doctrine of collateral estoppel, the state court judgment barred Petitioners from seeking a determination that they had standing under § 108(a). The Bankruptcy Court declined to decide the Petitioners' standing under § 108(a).

On June 27, 1991, the District Court affirmed the Bankruptcy Court. On February 21, 1992, the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court and District Court.

REASONS FOR GRANTING THE WRIT

The state court judgment is not entitled to collateral estoppel effect for two reasons: First, the pending state court *appeal* is actually a *de novo* review of a pure question of law, namely, Petitioners' standing under § 108(a); and therefore, the state court judgment is not final. Lacking finality, the state court judgment was not and is not entitled to any collateral estoppel effect. Second, regardless of finality, the bankruptcy law is a unique and specialized body of federal law, jurisdiction of which is committed to the federal courts, which brings this case within a broader exception to collateral estoppel, involving factors relating to the special allocation of jurisdiction.

With regard to the Petitioners' standing under § 108(a), it is inappropriate to resolve the standing issue by determining whether or not the Petitioners were still debtors in possession at the time they filed the state court malpractice suit, because there is *no* distinction between a debtor and a debtor in possession in a Chapter 11 case, where no trustee has been appointed.

Second, even if the debtor/debtor in possession distinction is valid, confirmation of Petitioners' reorganization plan did *not* terminate their status as debtors in possession.

Third, even if Petitioners were no longer debtors in possession on September 19, 1989, it should not matter. The underlying purpose of § 108(a), in a Chapter 11 case without a trustee, is to afford the Petitioners a full two-year "breathing spell" in which to evaluate and commence litigation. Making one's § 108(a) standing turn on his continued status as "debtor in possession,"

which may terminate long before the expiration of the two-year extension (if confirmation so causes), arbitrarily and prematurely deprives him and his creditors of the essential benefits of the statute, and confers a windfall on potential defendants, who should reasonably anticipate being sued for up to two full years following the date of the filing of a petition in bankruptcy. Such a narrow construction of § 108(a) is incongruous with well-established treatment of other parallel provisions of the Bankruptcy Code.

ARGUMENT

ISSUE NO. 1

COLLATERAL ESTOPPEL

A. *The De Novo Exception To Finality:*

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court adopted § 13 of the Restatement (Second) of Judgments which holds that a judgment is final for purposes of issue and claim preclusion despite the taking of an appeal unless the "appeal" is actually a trial *de novo*.

Before *Scurlock*, no Texas judgment being appealed was entitled to collateral estoppel effect until all appeals were exhausted. By adopting the Restatement, *Scurlock* changed Texas law significantly by imparting finality to a judgment being appealed, for the purposes of collateral estoppel, *except* where the appeal is actually a trial *de novo*.

The *de novo* exception applies here. The state court judgment is a summary judgment based on undisputed facts. The state trial, court's interpretation of § 108(a) disposed of the Respondents' single defense of limitations, which disposed of the entire case. The State appellate court must only review the correctness of the state trial court's legal interpretation of § 108(a). To do so, the state appellate court must *itself* interpret and construe § 108(a) anew, unrestricted by any presumption or any deference favoring the trial court. The appeal is, in essence, a trial *de novo* of a pure

legal issue of federal statutory law arising from a set of uncontested material facts.

The case of *Citibank N.A. v. Graphic Scanning Corporation*, 618 F.2d 222 (2nd Cir. 1980) is analogous. There, the New York state trial court granted summary judgment, holding that as a matter of law, Graphic Scanning was not a common carrier under federal law and, therefore, its failure to comply with the Communications Act and F.C.C. rules was not a defense available to Citibank. After losing in the state trial court, Citibank filed a new suit against Graphic Scanning in the U.S. District Court for violating the Communications Act and F.C.C. Rules. In rejecting Graphic Scanning's plea of collateral estoppel, the Second Circuit stated at page 225 that:

> "Furthermore, because the state court found no facts, but merely expressed a conclusion of law, its determination that Scanning is not a common carrier is not preclusive in later federal litigation by reason of collateral estoppel." *Id.* at 255, citing *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.) cert. denied, 350 U.S. 826, 76 S.Ct. 52 (1955); *Abramson v. Pennwood Investment Corp.*, 392 F.2nd 759 (2d Cir. 1968).

The application of *Citibank* to this case is clear. In both cases, a state trial court decided a pure question of federal law by granting summary judgment, thereby determining a party's status under a body of federal law, the subject of a federal court's specialized application and enforcement.

B. *Exception Relating to the Allocation of Jurisdiction:*

Aside from the absence of finality, the state court judgment is not entitled to any collateral estoppel effect because of the subject matter involved. After dealing with the finality issue, the court in *Scurlock*, *supra* at page 7, acknowledged the controlling effect of § 28 of the Restatement (Second) of Judgments, which recognizes certain exceptions to the application of collateral estoppel, *regardless of finality.*

In pertinent part, § 28, Restatement (Second) of Judgments provides that:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts *or by factors relating to the allocation of jurisdiction between them*; (emphasis added).

In the instant case, the *allocation of jurisdiction* between the Bankruptcy Court and the state court warrants a new determination of Petitioners' standing to invoke 11 USC § 108(a). However, Petitioners should not be misunderstood to say that the state court lacked subject matter jurisdiction. Clearly, the state court had jurisdiction to decide whether Petitioners' malpractice action was barred by limitations, which necessarily required it to construe §108(a) of the Bankruptcy Code. Contrary to Respondents' arguments below, which Petitioners' submit effectively sidetracked the courts below, the point is not whether the state court had jurisdiction, but whether the federal judiciary's special responsibilities for the federal bankruptcy laws renders this the type of case envisioned by the Restatement, where collateral estoppel simply does not apply *at all.*

Bankruptcy law is constitutionally committed to the federal judiciary. Bankruptcy courts constitute special units of the U.S. District Courts. 28 USC § 151. U.S. District Courts have original and exclusive jurisdiction of all cases under Title 11. *See* 28 USC § 1334(a). Bankruptcy judges are judicial officers of the U.S. District Court exercising original and exclusive subject matter jurisdiction over cases arising under Title 11, USC. *See* 28 USC § 152(a)(1). A state court's only brush with the bankruptcy laws is apt to be an interpretation of the Bankruptcy Code

incidental to deciding a state law question, as happened here. In contrast, the Bankruptcy Court's chief function is to interpret and apply the Bankruptcy Code. A person in bankruptcy ought to be able to look to the court administering that bankruptcy for a determination of his status, standing and rights under § 108(a), or any other section of the Bankruptcy Code, unfettered by a prior determination by a state court acting outside its bailiwick.

ISSUE NO. 2

STANDING UNDER 11 U.S.C. §108(a)

A. *Introduction:*

Section 108(a) extends the time to file suit on a bankrupt's cause of action which is not already barred by limitations on the date of filing the bankruptcy petition. It states that:

> (a) If applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the latter of —
>
> 1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> 2) two years after the order for relief.

All parties agree that the applicable two-year period of limitations under Texas law had not expired on March 25, 1988, the date Petitioners filed for relief under Chapter 11. The dispute is over Petitioners' standing to invoke the tolling provisions of § 108(a), which facially extends the period within which the "trustee" may file suit. No trustee has ever been appointed. Petitioners have functioned as "debtors-in-possession", having all of the rights and powers of a trustee. A debtor in possession is entitled to all the benefits of § 108(a). 11 USC § 1107(a) *In re Flying S Land & Cattle Co.*, 71 B.R. 183 (D. Nevada 1987);

Seawinds, Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 187 (N.D. Cal. 1987).

However, Respondents claim that Petitioners somehow lost their status as debtors in possession, and concomitantly their standing to invoke § 108(a), upon confirmation of their reorganization plan on June 28, 1989; that the event of confirmation itself automatically terminates the bankruptcy court's jurisdiction over Petitioners, and converts a debtor in possession to a mere debtor having no trustee powers. Respondents are wrong. In any event, a post-confirmation bankrupt should have standing under § 108(a) regardless of whether he is seen as a "debtor in possession" carrying out his plan or a "debtor" doing so. That is consistent with parallel cases recognizing a post-confirmation debtor's right (and even a creditor's right) to sue for preferences and fraudulent transfers under §§ 547 and 548 of the Bankruptcy Code, which, like § 108(a) ostensibly empower only the "trustee" to act.

B. *The Debtor/Debtor-in-Possession Distinction is Inappropriate and Irrelevant:*

Respondents have rely heavily on the Fifth Circuit's opinion in *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1460 (5th Cir. 1987). There, the debtor/debtor-in-possession filed suit *after* confirmation and invoked §108(a) to defeat the limitations defense of Healthco, Inc. Healthco argued unsuccessfully that confirmation of the plan automatically terminated the bankruptcy estate and the debtor's status as debtor in possession and, *ergo*, as "trustee". The plan reserved one-half of the recoveries for the Class 6 creditors. In permitting the debtor to invoke § 108(a), the Fifth Circuit held that the reservation in the plan was *sufficient* to defeat Healthco's argument. The Fifth Circuit did not have to decide and did not decide whether such a reservation is *necessary* to preserve standing under § 108(a). *See, In re Tennessee Wheel & Rubber Co.*, 64 B.R. 721 (N.D. Tenn. 1986), where the absence of such a reservation in the plan did not prevent a post-confirmation "debtor" from exercising the "trustee" powers under Sections 547 and 548 to file and prosecute preferential transfer

and fraudulent conveyance actions, *after* confirmation. Respondents have erroneously cited *Cunningham* for what it did *not* hold.

The rule stated in *Cunningham* applicable here is that *until the period of reorganization has ended*, the debtor in a Chapter 11 case without a trustee has standing to invoke § 108(a). The pertinent language of the Fifth Circuit opinion appears at page 1460:

> Thus, the statute of limitations is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on § 108's tolling of limitations period, and the limitations period would extend back to February 24, 1981. On the other hand, *if the reorganization period had ended* and Dental Leasing had returned to "debtor" status, then § 108's protection would not have been available to it . . . (emphasis added).

This analysis is misguided, because "distilling" the § 108(a) standing issue to whether a debtor is "still a debtor-in-possession" incorrectly attempts to distinguish between the two. They are one in the same. Section 1101(1) defines "debtor-in-possession" to mean debtor except when a person is serving as a trustee. Section 101(12) defines "debtor" to mean a person concerning which a case has been commenced. A case is "commenced" when a voluntary petition is filed by a person. 11 USC § 301. Once a case is commenced, it can only terminate by dismissal under § 349 or § 1112; closing of the case under § 350, and only then after the bankruptcy estate is fully administered; or it can be converted to a Chapter 7 liquidation under § 1112. "Debtor-in-possession" is synonymous with "debtor" in a Chapter 11 case, where no trustee is appointed, so as not to confuse the case with a Chapter 11 proceeding where a trustee has been appointed, in which case the debtor/trustee dichotomy applies. In a Chapter 11 case with no trustee, there is a debtor-in-possession until the case is closed, dismissed, or converted to a Chapter 7 case; there is either a debtor-in-possession or there is no Chapter 11 case. *See*:

In re Triangle Chemicals, Inc., 697 F.2d 1280, 1290 (5th Cir. 1983); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr. N.D. Tex. 1986); and *In re Hargis*, 73 B.R. 622, 625 (Bankr. N.D.Tex. 1987). In *Triangle Chemicals*, the Fifth Circuit Court of Appeals stated succinctly at 1290:

> As we view it, . . . there is no distinction between the "debtor" and the "debtor-in-possession" (where no trustee is appointed) with regard to the acts or transactions performed on its behalf subsequent to the filing of the reorganization petition.

C. *If the Debtor/Debtor-in-Possession Distinction Is Valid, the Period of Petitioners' Reorganization Had Not Ended by September 19, 1989. Thus, Their Status as Debtors-in-Possession Had Not Terminated.*

If the debtor/debtor-in-possession distinction does exist and does control standing under § 108(a) then when does a debtor cease to be a debtor-in-possession? The Fifth Circuit Court's language in *Cunningham* quoted above, suggests that debtor-in-possession status continues *at least* as long as the period of reorganization, a term not defined or used in the Bankruptcy Code or elucidated in *Cunningham*. Apparently, it is a term of art. A fair reading of *Cunningham* does not compel the conclusion that confirmation terminates the period of reorganization. Moreover, that conclusion is contrary to the well established law discussed *infra* that confirmation does not terminate the bankruptcy estate or its administration.

In the instant case, the plan confirmed on June 28, 1989, required the Petitioners to pay its unsecured creditors $20,000.00 within sixty (60) days, and another $20,000.00 each six months after confirmation until they were paid in full. It also provided for the payment of a long-term mortgage of a secured creditor and the litigation of several disputed claims, through objection hearings or, in the case of creditors Lyn Noble Hawthorne and Oliver Daniel, through full-blown evidentiary hearings and contested proceedings then pending in separate adversary

proceedings over which the plan reserved continuing jurisdiction and control by the Bankruptcy Court. Whatever the duration of the period of reorganization, it certainly had not ended by September 19, 1989. It was barely underway.

To support their argument that confirmation terminates debtor-in-possession (and thus, trustee) status, Respondents have employed a faulty syllogism which reads as follows:

> *Major Premise*: Under Section 1141(b), all property of the bankruptcy estate vests in the debtor upon confirmation of the plan, unless otherwise provided in the plan.
>
> *Minor Premise*: Since all property of the estate vests in the debtor on confirmation, the event of confirmation terminates the bankruptcy estate and the administration of it.
>
> *Conclusion*: If the bankruptcy estate, and its administration, terminates upon confirmation, then there can be no debtor-in-possession post-confirmation.

Though the major premise is correct, the minor premise, and therefore the conclusion, is wrong. Confirmation of the plan does *not* terminate the bankruptcy estate or its administration, but is merely one step in the administration process. *In re Lombard-Wall, Inc.*, 44 B.R. 928, 935 (S.D.N.Y. 1984), citing this Court's opinion in *Meyer v. Kenmore Granville Hotel*, 297 U.S. 160 (1936). In *Lombard*, the Court noted that:

> It is well established that confirmation of a plan is but a step in the administration of the debtor's estate; the bankruptcy court is still responsible for overseeing execution of the plan. *Meyer v. Kenmore Granville Hotel*, 297 U.S. 160, 165-66, 56 S.Ct. 405, 407-08, 80 L.Ed. 557 (1936) . . .
>
> *****
>
> Although Lombard's reorganization plan has been confirmed and the allowed claims paid in full, the case is clearly not closed, because the plan is not consummated. HDC's disputed claim is yet to be adjudicated. Therefore,

the bankruptcy court retains jurisdiction to aid the effectuation of the plan.

"Notwithstanding the entry of an order of confirmation (of a plan of reorganization) the court may enter all orders necessary to administer the *estate*." *Bankruptcy Service, Lawyers' Edition*, Ch. 6-10C, § 7B:66, at p. 51; Bankruptcy Rule 3020(d). Distributions to unsecured creditors under the plan, for example, are *elements* of administration of a bankruptcy estate, the closing of which is not mandated until complete administration has occurred. *Id.*, p. 52; *In re Tennessee Wheel & Rubber Co.*, 64 B.R. 721, 727 (M.D. Tenn. 1986). Bankruptcy Rule 3022, entitled Final Decree, expressly provides that only after an estate is *fully administered* shall the court enter a final decree "closing the case". Bankruptcy Rule 3022 is the procedural expression of § 350(a) of the Bankruptcy Code.

It is "horn book" law of bankruptcy that:

> Confirmation does not render administration of the estate complete and terminate the Bankruptcy Court's jurisdiction, since the Bankruptcy Court retains post-confirmation jurisdiction to complete any actions pertinent to the plan, such as actions to avoid preferential transfers [citing *In Re Tennessee Wheel & Rubber, infra*]. Moreover, the Bankruptcy Court's retention of post-confirmation jurisdiction over proceedings to recover preferences does not deprive the debtor of standing to prosecute such claims after confirmation as authorized under 11 U.S.C. § 1123(b), *notwithstanding the fact that any proceeds of preference recoveries will not accrue to the creditors.* [citing *In Re Air One, Inc.* (1987, BC Ed. Mo.) 75 B.R. 998]. *Bankruptcy Service*, Lawyers' Edition, *supra*, § 66 at p. 52.

See also: *In re Weatherfield Farms, Inc.*, 34 B.R. 435, 438 (Bankr. D. Vt. 1983); *In re Chernicky Coal Co., Inc.*, 67 B.R. 828 (Bankr. W.D. Pa. 1986); *In re Fortner Oilfield Services, Inc.*, 49 B.R. 9, 10 (Bankr. N.D. Tex. 1984).

D. *Debtor-in-Possession Status Should Not Control the Issue of Standing Under § 108(a)*

Confirmation of a plan which does not reserve the cause of action in question *should not* terminate the debtor's standing under § 108(a), *even if* confirmation terminates debtor-in-possession status. This court should reject the Fifth Circuit's statements in *Cunningham* at 1460 that the limitations issue is "distilled" to whether the debtor is still a debtor-in-possession. That analysis is contrary to the underlying purpose of § 108(a) and incongruous with the established interpretation of analogous Bankruptcy Code provisions dealing with post-confirmation suits to recover preferences (§ 547) and fraudulent transfers (§ 548).

The clear purpose of § 108(a) is to provide a two-year "breathing spell" to evaluate prospective litigation and to gather the wherewithal to prosecute it. The court in *Seawinds* at p. 189 explained it this way:

> The purpose of § 108(a) of the Bankruptcy code, on the other hand, is to give the trustee or debtor sufficient time to decide whether to start a lawsuit. 'The debtor is granted a grace period to determine whether his rights, which might be unknown on the Filing Date, are worth pursuing in the courts.' *Matter of Lauderdale Motor Corp., supra*, 35 B.R. at 549. A broad reading of this provision furthers the bankruptcy goals of *preserving the maximum amount of property and business opportunities for the estate.* See *In re Santa Fe Development and Mortgage Corp., supra*, 16 B.R. at 168 (construing § 108(b)). Section 108(a) thus furthers the bankruptcy policy of preserving assets of the estate, *including a debtor's causes of action*, see 11 U.S.C. § 541(a)(1), which may be affected by statutes of limitation. (Emphasis added).

Importantly, this "breathing spell" also gives the debtor time to "heal up" financially in order to fight the fight. Section 1121 encourages the debtor to propose a plan within 120 days after filing bankruptcy, or else spend scarce resources fending off

creditors' motions to force a plan or convert the Chapter 11 reorganization to a Chapter 7 liquidation. Faced with this imperative, and the crippled financial condition that forced the debtor in bankruptcy, the debtor in most cases must commit substantially all of his limited resources to retain counsel, file bankruptcy and keep the post-petition boat afloat long enough to propose and get a plan confirmed. This environment will leave the debtor with little, if any, ability to finance litigation before confirmation.

Yet, Respondents would have the Court construe § 108(a) so as to force a Chapter 11 debtor to commence all litigation before confirmation, where state law limitations had already run, no matter how much of the two-year period under § 108(a) remained. Respondents' construction emasculates the statute. Ironically, it penalizes the debtor who strives for early confirmation and encourages debtors to delay proposing a plan in order to maximize the tolling benefits of § 108(a). Such a result is hardly beneficial to the debtor's creditors, whom § 108(a) was designed to protect.

In *In re Korvettes, Inc.*, 42 B.R. 217 (Bankr. S.D.N.Y. 1984), the Court voiced the same concern about forcing a debtor-in-possession to file preference actions before confirmation. The Court was construing § 546(a), which requires the "trustee" to file preference actions no later than two (2) years after the trustee's "appointment". The defendant argued that the date of bankruptcy was the debtor-in-possession's functional "appointment" as trustee; and, therefore, the debtor-in-possession had to file preference actions, if at all, no later than two years after the date of bankruptcy. The Court rejected that argument. The Court observed that many reorganization plans are not confirmed within two years of bankruptcy, and to require a debtor-in-possession to bring preference actions before confirmation would, in many cases, frustrate and impede the whole process of reorganization. At page 220, the Court stated the following:

> Thus, to compel the issue of preferences to be brought to the forefront prematurely in the reorganization process has

> the potential of impeding progress toward the formulation of a consensual plan and could indeed stall negotiations altogether. Such a blanket construction would thus either compel preference litigation to be brought in the midst of negotiations or compel all reorganizations, no matter the size of the interest or the complexity of the legal or economic issues involved, to be focused upon well in advance of two years from the filing date. In this era where large and complex reorganization cases have proliferated, either eventuality would place undue pressure on the effected parties. This, in turn, would run contrary to the essential goals and philosophy espoused in Code Chapter 11 of fostering the reorganization and avoiding the liquidation of troubled debtors.

Denying a post-confirmation debtor standing to invoke §108(a) is incongruous with parallel bankruptcy statutes. On its face, §108(a) purports to grant only the "trustee" an extension of limitations. Similarly, §§ 547(b) and 548(a) of the Bankruptcy Code purport to empower only the "trustee" to recover preferential and fraudulent transfers. However, it is well established that a debtor is entitled to commence actions after confirmation to recover preferential and fraudulent transfers, *even where* the plan does not expressly reserve or dedicate the recoveries from such actions to the creditors. *See*: *In re Tennessee Wheel & Rubber Co.*, *supra* at p. 723; *In re J. E. Jennings, Inc.*, 46 B.R. 167 (Bankr. E.D. Pa. 1985)

Another analogous case regarding standing is *In re Chernicky Coal Co., Inc.*, 67 B.R. 828, 832 (Bankr. W.D. Pa. 1986), which deals with standing to file actions under § 549 which only empowers the "trustee" to void certain post-petition transfers. There, the court held that even a debtor's *creditors* have standing to file and prosecute avoidance actions under § 549, though the statute only purports to grant the "trustee" a right of action.

If a post-confirmation debtor, who is not a debtor-in-possession, *and even his creditors*, may exercise the powers of a "trustee" to file and prosecute actions under §§ 547, 548, and 549,

then why may he not stand in the same trustee shoes and invoke §108(a)? *There is no rational basis for such disparate treatment.*

The court's opinion in *Tennessee Wheel* exposes the weakness and error of Respondents' assertion that confirmation terminates the bankruptcy estate and its administration and transforms a debtor-in-possession to a mere debtor with no trustee powers. There, the debtor filed avoidance actions under §§ 547 and 548 *after* confirmation. Significantly, the plan provided that all property of the estate, *including recoveries from the avoidance actions*, would vest in the debtor upon confirmation free and clear of the claims of the creditors (Id. at 723); it did not reserve any portion of the recoveries to the creditors. The court characterized the post-confirmation debtor as the successor-in-interest to the pre-confirmation debtor (Id. at 727), with standing to file and prosecute the avoidance actions.

The centerpiece of Respondents' argument is this: since § 1141 vests all property of the estate in the debtor upon confirmation, any recoveries from a suit filed post-confirmation will only inure to the debtor, not the creditors. In a well-reasoned analysis, the Court in *Tennessee Wheel*, at pp. 725-727, thoroughly and categorically discredited and rejected that argument (Id. at 725-727):

> The 'benefit' to unsecured claimholders necessary to support a debtor's post-confirmation recovery powers has taken many forms in the reported decisions. In the leading case, Judge Bare found benefit to unsecured claimholders sufficient to support avoidance powers in a post-confirmation successor-in-interest to the debtor as follows:
>
> > As noted, all those general, unsecured creditors whose claims were impaired under the Modified Plan received as part and parcel of their distribution either actual shares of stock or certain rights to purchase shares of stock in the successor-in-interest. Clearly, to the extent that plaintiff's recovery of fraudulent transfers and preferences

> operates to increase the assets and financial health of the successor-in-interest, it also operates to proportionately increase the value of those ownership rights in the successor-in-interest. Clearly, to the extent that plaintiff's recovery of fraudulent transfers and preferences operates to increase the assets and financial health of the successor-in-interest, it also operates to proportionally increase the value of those ownership rights in the successor-in-interest which constitute a portion of the unsecured creditors' distribution under the plan.

Duvoisin, 59 B.R. at 641. In *Centennial Industries* 12 B.R. at 102, the benefit to creditors was the likelihood that preference recoveries would increase the probability of success of reorganization. This was sufficient benefit notwithstanding that the distribution percentage to unsecured claimholders was fixed by the plan (as is here the case) and would not be increased by preference recoveries. In *J.E. Jennings, Inc. v. William Carter Co.*, 46 B.R. 167 (Bankr. E.D. Pa. 1985), the court permitted the debtor to pursue preference actions post-confirmation although the transfers and the debtor's intent to avoid them were not disclosed prior to confirmation and there was no indication that recovery would affect the dividend to unsecured claimholders. The court stated that confirmation should not be a windfall for the preferential transferee. *Id.* at 170.

[The court then proceeded to discuss *Tennessee Wheel's* avoidance of transfers actions]

The post-confirmation exercise of these powers is one source of the debtor's repayment of money advanced by FANB to pay the general creditors. This estate has unsecured priority and administrative claimants and unpaid post-petition trade creditors who are dependent for payment upon the success of reorganization. The

> preference and fraudulent conveyance recoveries are essential to the debtor's ability to pay its creditors pursuant to the confirmed plan.
>
> Denying avoidance powers to the post-confirmation debtor would imbalance the equities of this case. These defendants would escape with their avoidable transfers *through the happenstance of the timing of lawsuits* within the reorganization case.

Respondents' "no benefit to creditors" argument overlooks the obvious. Under § 1141(b), a cause of action sued on *before* confirmation vests in the debtor upon confirmation just as completely as a cause of action sued on *after* confirmation. Here, had Petitioners sued Respondents the day *before* confirmation, this cause of action would have vested in them the next day free and clear of the claims of creditors. According to Respondents' logic, whatever vests in the debtor upon confirmation by the operation of § 1141(b) will only benefit the debtor and not the creditors. Respondents evidently suppose that because the plan does not *require* the debtor to use post-confirmation recoveries to pay creditors, the debtor will not so need them. That is absurd!

It is the very properties, which vest in the debtor upon confirmation that must be utilized one way or another to pay the creditors *after* confirmation. Only the plan provides for payments to creditors. Only confirmation activates the plan. Payments to creditors only occur *upon* or after confirmation. Strangely, the Respondents seem to have no problem with a debtor using his properties and cash, after confirmation, to *start* paying creditors under the plan, but object to a debtor pursuing causes of action (particularly against these Respondents) to generate funds to *continue* paying creditors under the plan.

The court in *Tennessee Wheel*, at p. 726, further criticized the Respondents' arguments by pointing to the fundamental inequity

of denying a post-confirmation debtor the powers of a trustee to prosecute avoidance actions and, by analogy, the powers of a trustee to invoke § 108(a). The court stated:

> Denying avoidance powers to the post-confirmation debtor would imbalance the equities of this case. These defendants would escape with their avoidable transfers through the happenstance of the timing of lawsuits within the reorganization case.

The *Tennessee Wheel* court cited *J. E. Jennings, Inc. v. William Carter Co., supra.* The court noted that *Jennings* permitted the debtor to pursue post-confirmation actions even though those actions were *not disclosed* prior to confirmation and even though ". . . there was no indication that recovery would affect the dividend to unsecured claimholders . . . [because] *confirmation should not be a windfall for the preferential transferee. Id.* at 170." *Id.* at 725-726.

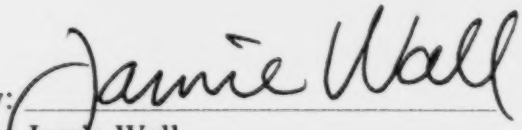
The Defendants here seek to enjoy the same windfall — to evade liability for their negligent conduct, which damaged Plaintiffs severely and put them in bankruptcy, merely because Plaintiffs sued them about 18 months into the 24-month extension period, rather than about 15 months into the 24-month extension period. It is difficult to imagine a more inequitable result. It is indeed a windfall considering that § 108(a) clearly imparts notice to the Respondents of the prospect of suit for up to two years after Petitioners filed bankruptcy.

CONCLUSION

The District Court, the Bankruptcy court and the Fifth Circuit Court of Appeals erred in relying on the doctrine of collateral estoppel to avoid deciding the merits of this controversy. The State Court Judgment is simply not entitled to a collateral estoppel effect. There were no disputed fact issues below. Petitioners were entitled to summary judgment in the Bankruptcy Court declaring that they had standing to invoke the tolling provisions of § 108(a) on September 19, 1989, when they sued Respondents in State Court. It would be wasteful to remand this case for a

decision on the merits of the standing issue. Regardless of how the courts below might decide that issue on remand, an appeal is inevitable; the question at hand is too important. In the interest of judicial economy, and to minimize the expense to the litigants, this Court should decide the § 108(a) standing issue on its merits.

Respectfully submitted,

By: 

Jamie Wall
State Bar No. 20756700
12222 Merit Drive, Suite 955
Dallas, Texas 75251
214-991-0991
214-991-0993 fax

COUNSEL FOR PETITIONERS —
Ray G. Besing and
Ray G. Besing & Associates P.C.

Dated: June 22, 1992